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15  
16 **UNITED STATES DISTRICT COURT**  
17 **CENTRAL DISTRICT OF CALIFORNIA**  
18

19 JONATHAN RETTA, *et al.*,

20 Plaintiffs,

21 v.

22 MILLENNIUM PRODUCTS, Inc.,  
23 *et al.*

24 Defendants.  
25  
26  
27  
28

Case No. 15-CV-1801-PSG-AJW

**DEFENDANTS' OPPOSITION TO  
PLAINTIFFS' EX PARTE  
APPLICATION REQUESTING  
ORDER SHORTENING TIME TO  
HEAR MOTION TO INTERVENE  
AND LEAVE TO APPEAR AT  
HEARING ON MOTION FOR  
PRELIMINARY APPROVAL**

Judge: Hon. Philip S. Gutierrez

SAC Filed: August 19, 2016  
Trial Date: Not Set

## OPPOSITION TO EX PARTE APPLICATION

The *ex parte* application filed by Intervenor (the “Application”) has nothing to do with protecting absent class members—it is a groundless attempt by one group of attorneys to interfere with the proposed settlement of a competing group. And the Court should deny the Application for three reasons.

**First**, there is no genuine emergency here. Intervenor has known about the settlement reached in the present action since June 2016 and received a near final copy of the settlement and preliminary approval papers on August 5, 2016, and the as-filed set on August 16, 2016. (Declaration of Daniel J. Faria in Support of Opposition to *Ex Parte* Application (“Faria Decl.”) at ¶¶ 2-3.) Accordingly, Ms. Pedro’s counsel had sufficient time to file a regular motion and appear to have filed the Application as a result of unsuccessful efforts to negotiate a resolution between themselves and plaintiffs’ counsel in the present action. *See, e.g.*, Memo of P & A ISO Ex Parte App., Dkt. No. 84-1 at 10 (“When the September 8, 2016 meeting was unsuccessful at forging any resolution of the matter, Intervenor was pushed to find another alternative, which resulted in the researching and filing of these papers.”). But an *ex parte* application is not a bargaining chip. Counsel cannot argue, on the one hand, that the Application is so critical to the health and safety of putative class members that it must be addressed now and, on the other, that the motion was only necessary because counsel’s “wait and see” strategy failed.

**Second**, there is no basis for emergency relief. An *ex parte* application is only for extraordinary relief and a misuse of the device is sanctionable. *Mission Power Eng. v. Continental Cas. Co.*, 883 F. Supp. 488 (C.D. Cal. 1995). This is because *ex parte* applications seeking to circumvent regular motion procedures “are inherently unfair, and they pose a threat to the administration of justice. They debilitate the adversary system. Though the adversary does have a chance to be heard, the parties’ opportunities to prepare are grossly unbalanced.” *Id.* at 490. Counsel attempts to address this fact by suggesting that the *Pedro* complaint differs

1 from *Retta* in that it raises safety concerns—specifically about the possibility that  
2 the bottles could, because of secondary fermentation, explode. Dkt. No. 84-1 at 4-  
3 7. However, despite counsel’s attempt to argue otherwise through the use of  
4 inflammatory images, the *Pedro* action is not actually a personal injury case and  
5 does not properly implicate safety concerns.

6 Neither named plaintiff in *Pedro* alleges that they even purchased an  
7 “exploding” bottle, which forms the basis of their alleged safety claims in the  
8 Application. Ms. Pedro alleges that she “has found that her bottle of Kombucha has  
9 broken its seal, leaked out of the bottle, spoiled, and by virtue of leaking spilled on,  
10 and caused damage to her personal property, including but not limited to purses and  
11 handbags, as well as their contents”. (*Pedro* Second Amended Class Complaint  
12 (“SAC”), No. 2:16-CV-03780-PSG-AJW, Dkt No. 82 at ¶ 5). Ms. Lewis does not  
13 make any allegations related to product leakage or bottle safety, but does allege that  
14 the product she purchased contained excessive amounts of alcohol and that she  
15 suffered health effects after consuming it. (*Id.* at ¶¶ 8-14.)

16 The exact nature and scope of the *Pedro* plaintiffs’ claims has been addressed  
17 before in two hearings before Judge Chesney, who oversaw the case prior to its  
18 transfer. At an April 15, 2016 hearing on Millennium’s motion to stay the *Pedro*  
19 case, Judge Chesney described what is patent in the *Pedro* complaint: despite  
20 counsel’s efforts to characterize their case as one about personal injury and safety,  
21 such claims cannot be addressed on a classwide basis and the *Pedro* action is  
22 premised on two defects—alcohol claims and product loss claims related to the  
23 alleged consequences of secondary fermentation:

24 Judge Chesney: So I think that in terms of similarity, that these classes  
25 are similar enough. The real question is whether the issues are  
26 sufficiently similar. Certainly if the *Retta* case were the larger case  
27 and essentially just ate up all of the case that we have, the *Pedro* case,  
28 there wouldn’t be any problem. The question is really whether the  
second case presents issues that for one reason or another should

1 preclude a stay or transfer. In reading over the cases, I do think  
2 there's enough of an overlap here. Although the plaintiff is  
3 downplaying now the alcoholic content, it played a very significant  
4 role in all of the counts, and essentially is the totality of the claim in  
the third cause of action. It's all based on alcohol.

5 I'm sure that the idea of exploding bottles and leaking bottles and  
6 damaged purses and this woman who got her eye cut are all very  
7 dramatic and certainly attention getting, but that would have to be on  
8 an individual cause of action. You're not going to be able to have a  
9 class action with all these different problems that people had. And at  
10 the last calling of the case, the plaintiffs' counsel disavowed any  
11 interest in pursuing a claim based on personal injury or property  
12 damage outside of whatever damage there was to the individual  
product that they bought and, thus, allege they can't use."

(Faria Decl., Ex. 3 at 11-12.)

13 In response to this, Ms. Pedro's counsel acknowledged that the *Pedro* action  
14 is not a personal injury matter, but tried to argue that the requested injunctive relief  
15 was broad enough to encompass the alleged safety issues, although the Court  
16 correctly noted that this was a strained reading of the Complaint—"It's relatively  
17 cryptic, I would say, not very specific." (*Id.* at 14-15.) In any event, it would be  
18 inappropriate, given the issues raised concerning the exact nature and scope of the  
19 *Pedro* claims, which have not even been tested at the pleading stage as of yet, to  
20 litigate the merits of a motion to intervene through such an extraordinary procedure.

21 Further, presumably in response to the *Retta* preliminary motion, on August  
22 19, 2016, the *Pedro* plaintiffs amended their complaint to allege that Millennium's  
23 products are also misbranded because they purportedly failed to warn consumers  
24 that the products pose alleged dangers. (*Pedro* SAC at ¶ 3.) But, as set forth  
25 above, the named Plaintiffs in *Pedro* do not actually allege any claims sounding in  
26 personal injury—their allegations involve product loss. (*Id.* at ¶¶ 6-15.) And as  
27 Judge Chesney recognized, the *Pedro* claims regarding product loss are directly  
28 related to the alcohol claims in *Retta* and share the same underpinnings regarding

1 the consequences of secondary fermentation in Millennium’s kombucha products.  
2 (Faria Decl., Ex. 3 at 30.)

3 Judge Chesney: If this case is resolved in some way, you know, all the  
4 problems are going to have to be fixed. People aren’t going to buy it  
5 because it stops having—if it stopped having alcohol, then it won’t be  
6 fermenting, then it won’t leak. It’s all kind of—you know, each thing  
is connected to the other.

7 So the Second Amended Complaint does not change the fact that the issues  
8 raised in the *Pedro* action are subsumed by the *Retta* action.

9 **Third**, a brief review of the concurrently filed Motion to Intervene (Dkt. No.  
10 85) reveals that it is meritless. Plaintiffs in the *Pedro* action claim that intervention  
11 as of right is appropriate owing to their naked assertion that their interests will not  
12 be adequately represented if a settlement is preliminarily approved in the present  
13 action. Memo of P & A ISO Mot. to Intervene, Dkt. No. 85-1 at 8-10. But it is  
14 well established that there is no intervention of right when a proposed intervenor  
15 can opt out of a proposed class action settlement. *See, e.g., Cohorst v. BRE*  
16 *Properties, Inc.*, No. 3:10-CV-2666-JM-BGS, 2011 U.S. Dist. LEXIS 87342, at \*9-  
17 10 (S.D. Cal. July 19, 2011) (“[W]here the right to object to the settlement at the  
18 Fairness hearing or to opt out of the settlement exists, intervention is simply  
19 unnecessary to protect a putative class member’s interests.”) (internal citations  
20 omitted); *Lane v. Facebook, Inc.*, No. C 08-3845 RS, 2009 U.S. Dist. LEXIS  
21 103668, at \*14-21 (N.D. Cal. Oct. 23, 2009) (denying motion for leave to intervene  
22 and to delay preliminary approval hearing where proposed intervenor could raise  
23 objections at final approval stage). If counsel truly have concerns with the  
24 proposed settlement of this action, these can be addressed through the final  
25 approval, as with any other objections filed. *Id.* at \*21 (“Despite Proposed  
26 Intervenor’s concern that preliminary approval may create at least a perception of  
27 ‘momentum,’ the Court will make its determination as to whether final approval  
28 should be granted based on the facts and law before it at that point in time . . .”).

1 The Court should not countenance an attempt to circumvent regular procedure here.

2 For these reasons, Defendants request that the Application be denied.

3  
4 Dated: September 16, 2016

O'MELVENY & MYERS LLP

5 By: /s/ Scott M. Voelz

6 Scott M. Voelz

7 Attorneys for Defendants  
8 Millennium Products, Inc.

9 Dated: September 16, 2016

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**SIGNATURE ATTESTATION**

The filing attorney attests that he has obtained concurrence regarding the filing of this document from its signatory, and, upon request, can provide a copy of a holographic signature corresponding to any signatures indicated by a conformed signature (/s/) within this e-filed document.

Dated: September 16, 2016

O'MELVENY & MYERS LLP

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